70-32+39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 819

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

No. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE BY THE CHAMBER OF COMMERCE OF THE UNITED STATES

MILTON A. SMITH,
General Counsel,
ANTHONY J. OBADAL,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.
Washington, D. C. 20006
Attorneys for the Amicus Curiae

LAWRENCE M. COHEN
HERBERT M. BERMAN
Lederer, Fox and Grove
111 W. Washington Street
Chicago, Illinois 60602

GERARD C. SMETANA,
925 S. Homan Avenue,
Chicago, Illinois 60607
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 910

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

No. 961

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE BY THE CHAMBER OF COMMERCE OF THE UNITED STATES

I.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States files this brief, *amicus curiae,* to present its views on a case of great importance in the administration of the National Labor Relations Act.[1]

---

[1] This brief is filed with the written consent of all parties in accordance with Rule 42(2) of this Court.

The National Chamber is a business federation with a membership of more than 3,800 state and local chambers of commerce and trade associations, and with an underlying membership of more than 5 million individual businessmen and business firms, a substantial number of which are engaged in commerce and subject to the National Labor Relations Act.

Many of these firms deal with various international and local unions as representatives of their employees in bargaining units established under the Act. Many have pension plans and other programs which provide benefits to persons who have retired from employment. In addition, such firms have numerous other relationships which, under the contentions of the Board and the *amici* unions, would be within the scope of collective bargaining.

The preservation of free collective bargaining from such unwarranted Government intrusion is a matter of vital continuing concern to the Chamber. For example, the Chamber recently appeared, as *amicus curiae,* in urging this Court that the National Labor Relations Board could not undermine this fundamental principle by ordering agreement to a substantive term of a collective bargaining agreement (*H. K. Porter Company, Inc.* v. *N.L.R.B.,* 397 U.S. 99 (1970)) and that, in order to foster voluntary collective bargaining, equitable relief should be available to compel compliance with agreements freely made. (*Boys Market, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235 (1970)). The Chamber has a similar interest in this case and believes its views and experience may again be of assistance to the Court.

• (*Boys Market, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235 (1970)).

II.

SUMMARY OF ARGUMENT

The Board's position violates basic statutory principles and seriously misconstrues the bargaining process.

First, the Board's argument that retired employees are now to be considered "employees" whom the Union may represent in collective bargaining with their former employer, significantly erodes the unit concept of bargaining firmly implanted in the Act. As this Court noted in *U.M.W.* v. *Pennington,* 381 U.S. 657, 666 (1965), bargaining is required only on a "unit by unit" basis. Under the Board's interpretation of the Act in this case, however, an employer will not simply be required to bargain with respect to its employees in an appropriate unit, but will also be subject to a mandatory obligation to bargain about "employees" not on its payroll, "employees" it can direct to perform no work, "employees" it can neither fire nor discipline—"employees" who are, in fact, not employees.

Second, the Board's independent and alternative argument that an employer must bargain over anything which "vitally affects" bargaining unit employees or the funds available for them, would logically appear to extend an employer's obligation to bargain about such fundamental and heretofore reserved decisions of management as whether to build a plant, to buy equipment, to mount an advertising campaign or to declare a dividend. These basic decisions are only a few of those which will necessarily limit the funds available for active unit employees and "affect their vital

interests."[2] Under the theory that an employer must bargain about any item which "vitally affects" unit employees, a union, once established as the exclusive representative of any specific employee unit, can enlarge the scope of its bargaining to include classes of employees or persons outside the confines of the unit which it represents, so long as it might appear that the wage or benefits of such outside groups "affect" unit employees. This theory represents a further and substantial step in the direction of discarding "unit bargaining" in favor of a broad concept of "interest" bargaining which has no apparent limitation and which will permit a union to bargain about any conceivable matter it deems of "interest" to itself as a labor organization.

Finally, we submit that the instant case presents this Court with an opportunity to establish clear and definitive guidelines regarding the mandatory bargaining obligation of employers and unions, so that they may both henceforth clearly understand their bargaining obligations under the Act.

Indeed, the Board's position, which radically alters the framework in which collective bargaining has heretofore been conducted, is evidence of the damage re-

---

[2] In its brief to this Court, the Board suggested that "employers normally regard retirees' benefits as part of their labor costs, so that these costs have a direct, and not merely an oblique effect upon the benefits of active unit employees." (p. 19). The internal accounting procedure of corporations may differ widely according to business practice and custom in each corporation. Whether accounting methods and sound tax administration require that an expenditure of funds be designated in one or another way, is immaterial. Ultimately, all employee benefits, as well as such expenses as advertising, maintenance, or depreciation, are part of the cost of doing business.

sulting from the absence of clear guidelines. For, only in the absence of guidelines could the Board have rendered this decision—a decision which, by requiring an employer to bargain about the settled benefits of retired employees, creates far-reaching new limits for the bargaining obligation.

III.

ARGUMENT

A. RETIRED EMPLOYEES ARE NOT EMPLOYEES OF THE COMPANY FROM WHICH THEY HAVE RETIRED FOR THE PURPOSES OF COLLECTIVE BARGAINING

1. The Board's Reasoning That Retired Individuals Are "Employees" Within the Meaning of Sec. 8(a)(5) Is Without Foundation in Law

The Board offered two reasons in support of its finding that the term "employee" in § 8(a)(5) should include retirees. Neither has merit.

(1) The Board reasoned that the term "employee" has the same meaning in Section 8(a)(5) as in Section 302(c) of the Act and Sections 401(a) and 501(c) of the Internal Revenue Code of 1954. Section 302(c) and the Revenue Code provisions, however, serve needs far different from those served by Section 8(a)(5). Section 302(c) is a criminal provision designed to protect the interests of beneficiaries; the Revenue Code provisions condemn the improper use of pension funds as a tax avoidance technique. Neither provision is, like Section 8(a)(5), intended to deal with employer unfair labor practices. The Board has drawn a dangerously over-simplified analogy in trying to import the meaning of the word "employee" from inappropriate statutory sources into the unfair labor practice section of the Labor Act.

(2) Finally, the Board justified a broad definition of "employee" by comparing that term to the term "employment," as used in Section 8(a)(3) of the Act. The Court below easily disposed of this argument in these words:

> "If prospective employees or those whose employment has ceased because of illegal discrimination are not regarded as within . . . [the] terms [of § 8(a)(3)], refusal to hire for unlawful reasons, and unlawful discharge, could never be unfair labor practices under this section."[3] (A. 12-13).[4]

The Board's attempt to "prove" that former employees remain employees of their former employer is self-defeating. Upon retirement these individuals are removed from the payroll. They retain no connection with their former employer; they perform no work, receive no pay and have no expectation of reemploy-

---

[3] The Board has also in other contexts recognized the necessary distinction between the use of the word "employees" in § 8(a)(5) and the use of the term "employment" in § 8(a)(3). In *Page Aircraft Maintenance Inc.*, 123 NLRB 159, 163 (1959), the Board pointed out that:

> We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited . . . which hold that the anti-discrimination provisions of section 8(a)(3), (4) and (b)(2) of the Act forbid discrimination against applicants for employment. The anti-discrimination provisions refer to "employees" *generally*, whereas unlike these provisions, section 8(a)(5) contains specific language requiring an employer to bargain for *"his" employees*. (Emphasis in original).

[4] Citations to the record refer to "Appendix to Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" in *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, October Term, 1970, No. 910.

ment. Under these circumstances, it is inconceivable that they could continue to be considered employees of the employer from whom they have permanently retired.

2. By Extending a Union's Representational Rights to Former Employees the Board Has Vitiated the Concept of Unit Bargaining

The Board urges a principle which would destroy the concept of unit bargaining and elastically extend the bargaining obligation of employers. For the theory that an individual who retains "a substantial connection to the bargaining unit" (A. 37) is an employee whom a union may represent in dealing with an employer could apply not only to retired employees, but also with equal force to other categories of non-unit individuals:

> (1) A former employee whose employment terminated because of a work-related disability. A person for whom an employer has contributed premiums for Workmen's Compensation insurance has as substantial a "connection to the bargaining unit" as a pensioned employee. Like a pensioned employee, an employee on Workmen's Compensation retains an interest in protecting or upgrading his insurance benefits.
>
> (2) An employee whose employment has terminated before retirement but who retains a vested interest in a company pension plan has a connection to the bargaining unit equal to that of retired employees. He also is a former employee with a substantial interest in his earned pension benefits.
>
> (3) Non-union supervisors and salaried employees, whose benefits are closely tied to those contained in a collective bargaining agreement, also have a substantial connection to the bargaining unit.

(4) Simliarly, employees at other facilities of the employer may have a connection to the bargaining unit, if they manufacture the same product, receive wages from the same source of funds or enjoy the same or nearly equivalent benefits.

These examples are not exhaustive; they merely illustrate the predictable consequences of the Board's extension of the term "employee" to encompass former or retired employees. Of perhaps greater concern than the probable extension of the bargaining obligation as a result of this decision to various groups of non-employees, is the almost certain breakdown of collective bargaining as a consequence of this extension. For example, a union representing retirees or other categories of non-employees could strike to enforce the demands of these non-employees. Thus, former or other groups of non-employees with little, if any, economic interest in the employer, could cripple its business operation. Moreover, no employer could ever hope to stabilize his legal commitments to retirees, or to predict the value of the services they had rendered when employed, since his duty to periodically renew retiree benefits will be perpetual. The Board's view, instead of promoting stable bargaining relationships, introduces into collective bargaining an entirely new dimension of instability and chaos—to the detriment of employees, employers and retired individuals.

B. AN EMPLOYER IS NOT OBLIGATED TO BARGAIN OVER THE BENEFITS OF RETIRED EMPLOYEES ON THE GROUND THAT THESE BENEFITS VITALLY AFFECT BARGAINING UNIT EMPLOYEES

The second ground upon which the Board rested its conclusion that the Employer must bargain about the benefits of retired employees—that these benefits "vitally affect" the interests of unit employees—has

not been supported by any dispositive reason in law. Indeed, the Board offered only unrelated and disconnected items of dicta to "prove" that the benefits of retired employees vitally affect the interests of active employees. Thus, the Board suggested that since active employees have an interest in retirement benefits, as well as an interest in the solvency and the administrative regularity of the retirement fund, they are vitally affected by negotiations dealing with the secured benefits of retired employees.

In the first place, however, Congress has expressly dealt with the administration of retirement trusts. The argument of the Board (see Board Brief, pp. 18-19) that disputes arising out of a breach of a pension plan are "better settled through collective bargaining than through litigation," overlooks the salient fact that Congress has seen fit to provide retirees with an *orderly* method of remedying a breach of a retirement plan trust under Section 301 of the Act as well as recourse to the courts for equitable relief. See *Blankenship* v. *Boyle, et al* (Judge Gissell's opinion) —— F. Supp. —— (U.S. D.C. D.C., 1971) 77 LRRM 2141. To introduce—in place of this Congressionally approved process for the orderly determination of pension disputes—a requirement that an employer must bargain about and on behalf of "strangers" whose employment status is non-existent will not lead to the peaceful and orderly settlement of disputes, but only to confusion and chaos. As noted, this requirement will, for the first time, impose mandatory bargaining over demands made by strangers who have little, or no, interest in the employer, but who might well have the ability to disrupt the employer's operation. They would certainly not be subject to the same economic deterrent as

active employees to refrain from disruptive activities. Secondly, a union's enforceable demand to upgrade pension benefits of retired employees destroys the ability of a company to finalize *current* wage costs, the same as if a union could require an employer to renegotiate and retroactively adjust past wages for services previously rendered. As board member Zagoria said in his dissenting opinion:

> "An oft-cited advantage of collective bargaining is that it results in a specific agreement satisfactory to both sides setting out a firm package of benefits for a fixed period. The company can base its prices and general business policy on this and workers can insist on exact payment of the agreed upon benefits. If mandatory bargaining is required, either party years later can reopen the agreement and unravel the provisions. Moreover, this is a two-way street, and not only upward. Thus, if the union may require bargaining over increases, could the employer not insist on decreases?" (A. 53).

Finally, as the Court below noted, active unit "employees are concerned about their own benefits." (A. 17). To contend that active unit employees and retirees share an interest in the administration of trust funds and in the upgrading of retirees' benefits is to ignore the plain fact that the interests of active employees and retired employees in retirement benefits are frequently not complimentary, but diametrically opposed. To increase retired employee benefits is to reduce funds available for active employee benefits. The converse is also true. While we do not suggest that active employees would inevitably act in opposition to the interests of retired employees, we do suggest that the Board, by establishing a *structure* which would

institutionalize the contrary interest of pensioners and active employees in the disposition of funds available for wages and employee benefit programs, would greatly enhance the potentiality conflict.[5]

C. THE BOARD HAS MISCONSTRUED THE CONTROLLING DECISIONS OF THIS COURT

The extended view of the mandatory duty of bargaining the Board has propounded and the Petitioner and the Union *amici* promote, results from a misunderstanding of the rule of this Court set forth in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964) and in *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959). A close analysis of these precedents clearly establishes that they not only fail to support the position of the Board and the unions, but, to the contrary, lend weight to the decision of the Court below.

Fibreboard and *Oliver* cannot be construed to require an employer to bargain about *any* matter which affects active unit employees. In *Oliver*, this Court said that a provision of a collective bargaining agreement for a unit of truck drivers which regulated truck rental the company paid to independent drivers, did not violate Ohio's anti-trust law, as such rental was a mandatory subject of bargaining.

The Court found that:

> "... *an inadequate rental might mean the progressive curtailment of jobs through withdrawal of*

[5] This fear that active employees would seek to advance their own interests at the expense of retirees is not dispelled by the fact that a few employers and unions have voluntarily negotiated increased retiree benefits; for under permissive bargaining, a company would not be required, as under mandatory bargaining, to bargain over a demand to *reduce* retired employee benefits.

more and more carrier owned vehicles from service." (Emphasis added). 358 U.S. 283, 294.

The truck rental provision was considered a mandatory subject of bargaining because and only because it protected jobs by foreclosing the contracting out of trucking services.

Similarly, in *Fibreboard* this Court carefully limited its ruling to read that, "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(d)." 379 U.S. 203, 215.

Thus, in both *Oliver* and *Fibreboard,* the Court dealt with *the* basic interest of employees: the existence of jobs. Concededly, in many circumstances, employer action to displace or eliminate unit jobs through subcontracting is subject to collective bargaining; but elimination of jobs is not comparable to employer action which affects only *former employees* and which has no affect on unit jobs or the job security of active employees. To extend by tenuous analogy the *Oliver* and *Fibreboard* doctrine, which requires bargaining only over action affecting the very *existence of jobs*—the fundamental expression of "wages, hours and terms and conditions of employment"—to a case involving the pension benefits of non-employees, twists the doctrine of requiring bargaining over the curtailment of jobs wholly beyond recognition.

Further, in neither *Fibreboard* nor *Oliver* did the Court uphold the right of the bargaining representatives of the unit to bargain about wages, benefits, or conditions *on behalf of* the subcontractors' employees or any other employees or persons outside the unit.

D. THE BOARD, PETITIONER UNION, AND UNION AMICI STATEMENTS AS TO INDUSTRIAL PRACTICE ARE NEITHER DEFINITIVE NOR CONCLUSIVE NOR A PART OF THE RECORD IN THE CASE

The Board, Petitioner Union and Union *Amici,* assert that bargaining over retiree benefits is a universal practice throughout industry. Therefore, they contend, a mandatory obligation is created. Not only is this reasoning wholly falacious, evidence to support it is not found in the record. Industry practice was not a subject of inquiry at the evidentiary stage of the Board proceedings. *Ex parte* statements not subject to cross-examination or rebuttal cannot be the basis of a new rule of law, especially where, as here, the rule would drastically alter basic industrial practices in the complex and varied field of collective bargaining.

Furthermore, the information available to the Chamber does not reveal a uniform practice. While some employers voluntarily negotiate benefits for retirees with their unions, others act unilaterally from time to time to improve these benefits. Many employers, as a matter of courtesy or policy, inform the unions of improved retirement benefits; and still others discuss, but do not negotiate, these improvements with the unions.

The Chamber submits, therefore, that voluntary industrial practice, particularly when not fully explored in an evidentiary hearing, can provide little guide for the interpretation of the statutory requirements. As Mr. Justice Stewart pointed out in *Fibreboard,* "the ultimate question is the scope of the duty to bargain defined by the statutory language." 379 U.S. at 220.

IV.

CONCLUSION

The bargaining obligation as defined and developed by the Board and by the Federal courts is not infinitely elastic; it has legal and practical limitations which the Board has stretched totally beyond recognition.

The Chamber submits that the Act cannot be distorted to fit the concept of collective bargaining the Board urges this Court to adopt. For all the foregoing reasons and for the reasons propounded by Respondents, we respectfully urge this Court to affirm the decision of the court below.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

ANTHONY J. OBADAL,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N. W.
Washington, D. C. 20006

Attorneys for the Amicus Curiae

LAWRENCE M. COHEN
HERBERT M. BERMAN
Lederer, Fox and Grove
111 W. Washington Street
Chicago, Illinois 60602

GERARD C. SMETANA,
925 S. Homan Avenue,
Chicago, Illinois 60607

Of Counsel